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**Committee Administering the Mechanism
for Promoting Implementation and Compliance****Thirteenth meeting**

Geneva, 7–10 September 2018

Item 3 (b) of the provisional agenda*

Specific submissions regarding Party**implementation and compliance:****evaluation of the amendment to paragraph 9 (c)
of the terms of reference****Evaluation of the amendment to paragraph 9 (c) of the terms of
reference¹****Note by the Secretariat****I. Introduction**

1. By its decision BC-13/9, the Conference of the Parties at its thirteenth meeting adopted the work programme for the biennium 2018–2019 of the Committee, attached to that decision, whereby it mandated the Committee, among other things, to prepare a report on its evaluation of the effectiveness of the amendment to paragraph 9 (c) of the terms of reference of the mechanism for promoting implementation and compliance adopted by decision BC-10/11, and further extended by decisions BC-11/8 and BC-12/7, including recommendations, for the consideration of the Conference of the Parties at its fourteenth meeting.

II. Implementation

2. Committee member Mr. Marcus Schroeder (Germany) took the lead on this activity of the work programme of the Committee. This activity was briefly introduced by the Secretariat during the Committee's informal consultations held on 21 November 2017 at which time the Secretariat reminded the Committee that this activity of the work programme was a continuation of a similar activity undertaken by the Committee under previous work programmes with a first report on the matter considered by the Committee at its eleventh meeting² and recommendations put forward by the Committee to the Conference of the Parties at its twelfth meeting adopted by decision BC-12/7.

3. A draft report on the evaluation of the effectiveness of the amendment to paragraph 9 (c) of the terms of reference of the Mechanism for promoting implementation and compliance with the Basel Convention, prepared under the guidance of the lead member, is set out in the annex to the present note.

* UNEP/CHW/CC.13/1.

¹ This document has not been formally edited.

² Document UNEP/CHW/CC.11/4.

III. Proposed action

4. The Committee is invited to consider the information contained in the present note including its annex. The Committee may wish to entrust the lead Committee member to finalize, taking into account the discussions held during its thirteenth meeting, the report on the evaluation of the effectiveness of the amendment to paragraph 9 (c) of the terms of reference of the Mechanism for promoting implementation and compliance with the Basel Convention, including recommendations, for the consideration of the Conference of the Parties at its fourteenth meeting.

Annex

Report on the evaluation of the effectiveness of the amendment to paragraph 9 (c) of the terms of reference of the Mechanism for promoting implementation and compliance with the Basel Convention

(July 2018 draft)

1. Introduction

1. By its decision VI/12, the Conference of the Parties at its sixth meeting adopted the terms of reference of the mechanism for promoting implementation and compliance set out in the appendix to that decision. Pursuant to paragraph 9 (c) of those terms of reference, submissions may be made to the Committee by “(t)he Secretariat, if, while acting pursuant to its functions under Articles 13 and 16, it becomes aware of possible difficulties of any Party in complying with its reporting obligations under Article 13, paragraph 3 of the Convention, provided that the matter has not been resolved within three months by consultation with the Party concerned.”

2. By its decision BC-10/11, the Conference of the Parties at its tenth meeting decided to amend, on a provisional basis for the period between the tenth and eleventh meetings of the Conference of the Parties, the terms of reference of the mechanism for promoting implementation and compliance by replacing paragraph 9 (c) with “The Secretariat, if, while acting pursuant to its functions under articles 13 and 16, it becomes aware of possible difficulties of any Party in complying with its obligations under paragraph 1 of Article 3, paragraph 1 (a) of Article 4, Article 5 and paragraphs 2 and 3 of Article 13 of the Convention, provided that the matter has not been resolved within three months by consultation with the Party concerned.”

3. By its decision BC-11/8, the Conference of the Parties at its eleventh meeting decided to extend, for the period between the eleventh and twelfth meetings of the Conference of the Parties, the amendment mentioned above. By its decision BC-12/7, paragraph 3, the Conference of the Parties at its twelfth meeting confirmed the amendment mentioned above with regard to possible difficulties encountered by any Party in complying with its obligations under Article 5 and paragraph 3 of Article 13 of the Convention. In addition, in paragraph 4 of its decision, the Conference of the Parties further extended, for the period between the twelfth and fourteenth meetings of the Conference of the Parties, the amendment mentioned above with respect to possible difficulties encountered by any party in complying with its obligations under paragraph 1 of Article 3, paragraph 1 (a) of Article 4 and paragraph 2 of Article 13 of the Convention.

4. By its decision BC-13/9, the Conference of the Parties at its thirteenth meeting adopted the work programme for the biennium 2018–2019 of the Committee, attached to that decision, whereby it mandated the Committee, among other things, to prepare a report on its evaluation of the effectiveness of the amendment to paragraph 9 (c) of the terms of reference, including recommendations, for the consideration of the Conference of the Parties at its fourteenth meeting.

5. In accordance with the amended paragraph 9 (c) of the terms of reference, the Secretariat may, make a submission to the Committee not only with regard to possible difficulties encountered by any Party in complying with its obligations under Article 5 and paragraph 3 of Article 13, but also, until the fourteenth meeting of the Conference of the Parties, with regard to possible difficulties encountered by any Party in complying with its obligations under paragraph 1 of Article 3, paragraph 1(a) of Article 4 and paragraph 2 of Article 13 of the Convention.

2. Paragraph 9 (c) of the terms of reference of the mechanism for promoting implementation and compliance with the Basel Convention

6. Under the amended paragraph 9 (c), the Secretariat may make a submission based on the possible difficulties of any Party in complying with its obligations under:

(a) Paragraph 1 of Article 3, namely the obligation to inform the Secretariat of the wastes other than those listed in Annexes I and II of the Basel Convention considered or defined as hazardous under its national legislation and of any requirements concerning the transboundary movement procedures applicable to such wastes;

- (b) Paragraph 1 (a) of Article 4, namely the obligation to inform the other Parties when exercising the right to prohibit the import of hazardous or other wastes for disposal;
- (c) Article 5, namely the obligation to designate one focal point and one or more competent authorities, to inform the Secretariat thereof within three months of the date of entry into force of the Convention for them as well as to inform the Secretariat within one month, of any changes regarding the designation made by them;
- (d) Paragraph 2 of Article 13, namely the obligation to transmit information on:
 - (i) Changes regarding the designation of the focal point or competent authority/ies (paragraph 2 (a) of Article 13);
 - (ii) Changes in the national definition of hazardous wastes (paragraph 2 (b) of Article 13);
 - (iii) Decisions not to consent totally or partially to the import of hazardous or other wastes for disposal within their jurisdiction (paragraph 2 (c) of Article 13);
 - (iv) Decisions taken by them to limit or ban the export of hazardous or other wastes (paragraph 2 (d) of Article 13);
 - (v) The request that copies of each notification concerning any given transboundary movement of hazardous wastes or other wastes and the response to it be sent to the Secretariat when a Party considered that its environment may be affected by that transboundary movement (paragraph 2 (e) of Article 13);
- (e) Paragraph 3 of Article 13, namely the national reporting obligation.

7. Although the five above mentioned provisions relate to an obligation for Parties to transmit information to the Secretariat, these obligations bear important particularities with respect to the circumstances in which the Secretariat may become aware of possible difficulties of any Party in complying with them.

8. Pursuant to Article 5 and paragraph 3 of Article 13 of the Convention, each Party has an obligation to transmit information, whatever the national circumstances may be. The mere fact that the required information, namely the designated focal point, the designated competent authority/ies, or the national report, is not transmitted to the Secretariat puts the Secretariat in the position of being aware of a Party's possible difficulties in complying with its obligations. By its decision BC/12-7, paragraph 3, the Conference of the Parties has confirmed that the Secretariat may make a submission with regard to possible difficulties encountered by any Party in complying with its obligations under Article 5 and paragraph 3 of Article 13.

9. From the Secretariat's perspective, access to information from Parties is different with respect to the obligations set out in paragraph 1 of Article 3, paragraph 1 (a) of Article 4 and paragraph 2 of Article 13 of the Convention. These are the three instances for an extended Secretariat trigger, the effectiveness of which must be evaluated by the Conference of the Parties during its fourteenth meeting.

10. Pursuant to paragraph 1 of Article 3, paragraph 1(a) of Article 4 and paragraph 2 of Article 13, the obligation to transmit information to the Secretariat only materializes itself under specific circumstances at the national level: there has to be either a decision to have a national definition of hazardous wastes; a decision to prohibit or restrict the import or export of hazardous wastes or other wastes; or there has to be a change to information previously transmitted to the Secretariat with respect to the designated competent authority(ies), focal point or a national definition of hazardous wastes. The mere fact that information is not transmitted to the Secretariat does not necessarily mean that a Party is potentially facing difficulties in complying with these obligations. In order for the Secretariat to become aware of compliance difficulties, it would need to know that the national circumstances have triggered the obligation to transmit respective information to the Secretariat. Such information about the change of the national circumstances is not automatically received by the Secretariat while exercising its functions in accordance with Article 16 of the Convention.

11. The following sections of the report provide information on the practice of the Secretariat with respect to its use of paragraph 9 (c) of the terms of reference with respect to possible difficulties encountered by any Party in complying with its obligations under Article 5 and paragraph 3 of Article 13. This is followed by an evaluation of the effectiveness of the amendment to paragraph 9 (c) of the terms of reference with regard to possible difficulties encountered by any Party in complying with its

obligations under paragraph 1 of Article 3, paragraph 1(a) of Article 4 and paragraph 2 of Article 13 of the Convention.

3. Designation of focal point and competent authority

12. As at 31 October 2018, [3] Parties have not transmitted to the Secretariat information on their designated competent authority/ies and or focal point. Accordingly, [3 Parties appear] to be facing difficulties in complying with Article 5.¹

13. It is the practice of the Secretariat to take action based on its awareness that a Party may be facing difficulties with its obligations under Article 5. The Secretariat communicates with the Party concerned and, in the event communication is not successful, it initiates consultations pursuant to paragraph 9 (c) of the terms of reference of the Committee. Accordingly, over time and as of 31 October 2018, the Secretariat has initiated consultations initially with 11 Parties, and subsequently with [3] other Parties. With respect to the 11 Parties, as the matter could not be resolved within three months by consultation with 4 of the Parties concerned, the Secretariat made 4 submissions to the Committee.² As at 31 October 2018, all 4 matters have been resolved, with the respective Parties having informed the Secretariat of their designation of their focal points and one or more competent authorities. With respect to the [3] other Parties, the matters have [not] been resolved within three months by consultation with [3] of the Parties concerned, and the Secretariat has made [3] submissions to the Committee which will be considered during its fourteenth meeting.

4. National reporting

14. The latest classification of compliance performance with the national reporting obligations undertaken by the Committee sets out the number of Parties that have not transmitted their national reports for 2014 and 2015, and the number of Parties that have submitted their report late or incomplete. From this classification, which is based on the national reports transmitted by Parties to the Secretariat, it appears that [76] Parties appeared to be facing difficulties in complying with paragraph 3 of Article 13 with respect to the year 2014, while [86] Parties appeared to be facing difficulties in complying with paragraph 3 of Article 13 with respect to the year 2015.³

15. With respect to possible difficulties in complying with paragraph 3 of Article 13, as at 31 October 2018, the Secretariat has in two instances initiated consultations with Parties pursuant to paragraph 9 (c) of the terms of reference of the Committee.

16. Firstly in 2009, the Secretariat initiated consultations with 96 Parties: 9 Parties having never reported, 65 Parties not having submitted a national report for 2006, and 22 Parties having submitted an incomplete report for 2006 on competent authority, focal point or national legislation. This had led the Secretariat, in 2010, to make submissions to the Committee regarding 9 Parties that had never transmitted a national report.⁴ As at 31 October 2018, [3] of the matters have been resolved.

17. Secondly, in 2017, the Secretariat initiated consultations with 46 Parties that had not transmitted a national report since 2009. As at 31 October 2018, [11] of those Parties had transmitted one or more national reports to the Secretariat, [8] Parties had informed the Secretariat of the difficulties they faced with the national reporting obligations, and 8 Parties had submitted a project proposal to the UNEP special programme on institutional strengthening, 5 of which were accepted and are currently being implemented.

18. *[paragraph to be added in the event Secretariat decides to make submissions to the ICC following ICC-13]*

5. National definition of hazardous wastes and changes thereto

19. With respect to the obligations set out in paragraph 1 of Article 3 and paragraph 2 (b) of Article 13, it is the practice of the Secretariat to cross check information notified to the Secretariat using the

¹ These Parties are Sao Tome (no competent authority), Sierra Leone (no focal point) and Tajikistan (no competent authority and focal point).

² The submissions were made regarding Afghanistan, Palau, Somalia and Turkmenistan. See <http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx>.

³ Document UNEP/CHW/CC.13/4/Add.1.

⁴ Submissions were made regarding Bhutan, Cabo Verde, Guinea-Bissau, Eritrea, Liberia, Libya, Nicaragua, Swaziland and Togo.

revised standardized format adopted by the Conference of the Parties at its tenth meeting, and the information reported under paragraph 3 of Article 13 with respect to national definitions in answers to question 2 of the revised questionnaire on transmission of information. The Secretariat is available to assist Parties in ensuring that the information so notified is as up to date, accurate and complete as possible to facilitate Parties' understanding of other Parties' national definitions of hazardous wastes.

20. As of 31 October 2018, [70] Parties have notified or reported national definitions of hazardous wastes. Once received and subject to the availability of funds, the Secretariat makes arrangements to translate these notifications into all six official languages of the United Nations and posts them on the website of the Convention.⁵

21. It is the responsibility of each Party to comply with the obligation to inform the Secretariat of the wastes other than those listed in Annexes I and II of the Basel Convention considered or defined as hazardous under its national legislation and of any requirements concerning the transboundary movements applicable to such wastes.

22. Paragraph 5 of Article 6 of the Convention stipulates the consequences of a national definition of hazardous wastes on the transboundary movement control procedure. In the case of a transboundary movement of wastes where the wastes are legally defined as or considered to be hazardous wastes only:

(a) By the State of export, the requirements of paragraph 9 of Article 6 that apply to the importer or disposer and the State of import shall apply mutatis mutandis to the exporter and State of export, respectively;

(b) By the State of import, or by the States of import and transit which are Parties, the requirements of paragraphs 1, 3, 4 and 6 of Article 6 that apply to the exporter and State of export shall apply mutatis mutandis to the importer or disposer and State of import, respectively; or

(c) By any State of transit which is a party, the provisions of paragraph 4 of Article 6 shall apply to such State.

23. The existence of a national definition of hazardous wastes thus has concrete implications on the extent and content of Parties' obligations in the event of the transboundary movement of such wastes. Lack of clarity with respect to the existence of a national definition of hazardous wastes may therefore affect the efficient implementation of the Convention.

24. To date, the extended trigger has not yet been used in relation to possible difficulties of any Party in complying with its obligations under paragraph 1 of Article 3 and paragraph 2 (b) of Article 13 of the Convention.

6. Prohibition or restriction of the import or export of hazardous wastes and other wastes

25. With respect to the obligations set out in paragraph 1 (a) of Article 4 and paragraphs 2 (c) and (d) of Article 13, it is the practice of the Secretariat to cross check information notified to the Secretariat using the revised standardized format adopted by the Conference of the Parties at its tenth meeting, and the information reported under paragraph 3 of Article 13 in answers to question 3 of the revised questionnaire on transmission of information. The Secretariat is available to assist Parties in ensuring that the information so notified is as up to date, accurate and complete as possible to facilitate Parties' understanding of other Parties' prohibition or restriction of the import, transit or export of hazardous wastes and other wastes.

26. As of 31 October 2018, [144] Parties have notified or reported prohibitions or restrictions of the import, transit or export of hazardous wastes and other wastes. As with notifications of national definitions, once received and subject to the availability of funds, the Secretariat makes arrangements to translate notifications of prohibitions and restrictions into all six official languages of the United Nations and post them on the website of the Convention.⁶

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<http://www.basel.int/Countries/NationalDefinitions/NationalDefinitionsofHazardousWastes/tabid/1480/Default.aspx>.

⁶ <http://www.basel.int/Countries/ImportExportRestrictions/tabid/4835/Default.aspx>.

27. It is the responsibility of each Party to comply with the obligation to inform the Secretariat of the existence of prohibitions or restrictions of the import, transit or export of hazardous wastes and other wastes.
28. Paragraph 1 (b) of Article 4 of the Convention stipulates the consequences of the notification of a prohibition of import of hazardous wastes and other wastes: Parties so notified shall prohibit or not permit the export of hazardous and other wastes to the party that has prohibited the import of such wastes.
29. The existence of an import prohibition thus has concrete implications on the extent and content of Parties' obligations in the event of the transboundary movement of such wastes. Lack of clarity with respect to the existence of prohibitions or restrictions of the import, transit or export of hazardous wastes and other wastes may affect the efficient implementation of the Convention.
30. To date, the extended trigger has not yet been used in relation to possible difficulties of any party in complying with its obligations under Article 4 and paragraphs 2 (c) and (d) of Article 13 of the Convention.

7. Changes regarding the designation of competent authorities and/or focal points

31. Parties regularly transmit to the Secretariat changes regarding the designation of competent authorities and or focal points, pursuant to Article 5 of the Convention. It is the practice of the Secretariat to cross check information notified to the Secretariat using the revised standardized format adopted by the Conference of the Parties and the information reported under paragraph 3 of Article 13.
32. Once received and checked as needed with the Party concerned, changes regarding the designation of competent authorities and/or focal points, transmitted pursuant to paragraph 2 (a) of Article 13 are made available to all Parties and stakeholders on the website of the Convention. Lack of transmission of changes regarding the designation of competent authorities and/or focal points has concrete implications on the effective implementation of the Convention.
33. To date, the extended trigger has not yet been used in relation to possible difficulties of any party in complying with its obligations under paragraph 2 (a) of Article 13.
34. Although not covered by this provision, it is important to also bear in mind that the lack of transmission of updates to contact information for competent authorities and/or focal points is a matter of concern which is often brought to the attention of the Secretariat as it also has concrete impacts on the effective implementation of the Convention. The Secretariat is continuously reviewing the status of the designated competent authorities and focal points. Activities in this regard include: individual, bilateral follow up with Parties by various means including email, telephone and Skype; face-to-face follow up where possible with Parties for whom the Secretariat has been made aware that there may be changes to previously transmitted contact details; communications annexed to meeting invitations inviting Parties to verify previously designated country contacts; and proactive verification of possible updates to contacts based on updated information transmitted in relation to the Rotterdam and Stockholm Conventions.

8. Conclusions

35. Based on this report, the Committee at its thirteenth meeting has drawn the following conclusions regarding the amendment to paragraph 9(c) adopted by the Conference of the Parties at its tenth meeting:

[(a) The Secretariat has successfully made use of the possibility under paragraph 9(c) of the terms reference to make 13 submissions to the Committee based on the possible difficulties faced by Parties in complying with their obligations under Article 5 and under paragraph 3 of Article 13 of the Convention. All submissions have been deemed admissible by the Committee and, as at 31 October 2018, [] matters have been resolved;]

(b) *[paragraph to be added in the event Secretariat decides to make submissions to the ICC following ICC-13]*

(c) The Secretariat has not yet made use of the possibility, under the amended paragraph 9 (c) of the terms of reference, to make a submission to the Committee with respect to possible difficulties of any Party in complying with its obligations under paragraph 1 of Article 3, paragraph 1(a) of Article 4 and paragraph 2 of Article 13 of the Convention;

(d) Failure to comply with the obligations set out in paragraph 1 of Article 3, paragraph 1(a) of Article 4 and paragraph 2 of Article 13 of the Convention affects the efficient implementation

of the Convention. However, the obligation to transmit information to the Secretariat only materializes itself under specific circumstances at the national level, and such knowledge would need to be received by the Secretariat while exercising its functions in accordance with Article 16 of the Convention. Unlike Article 5 and paragraph 3 of Article 13 of the Convention, the Secretariat is not in a position to become aware of possible difficulties of any Party in complying with these obligations as a result of the mere lack of transmission of information to it by a Party;

(e) The Committee therefore recommends that the Conference of the Parties, at its fourteenth meeting decide not to extend the amendment referred to in paragraph 4 of Decision BC-12/7.
